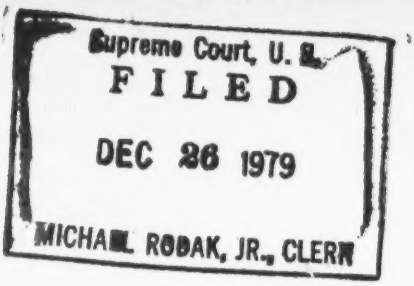

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM - 1979

NO. 79-999

FLORIDA EAST COAST RAILWAY, PETITIONER

vs.

DEPARTMENT OF REVENUE, STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF FLORIDA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM - 1979

NO.

FLORIDA EAST COAST RAILWAY, PETITIONER

vs.

DEPARTMENT OF REVENUE, STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

TO SUPREME COURT OF FLORIDA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered in this matter on October 2, 1979.

OPINIONS BELOW

The unreported October 2, 1979 opinion of the Supreme Court of Florida, whose judgment is herein sought to be reviewed, is reprinted in the separate appendix to this petition, at page 27. The prior unreported opinion of the Dis-

trict Court of Appeal of Florida, First District, is reprinted in the appendix at page 28. The original order of the State of Florida Department of Revenue is unreported and reprinted in the appendix at pages 34 - 75.

JURISDICTION

The judgment of the Supreme Court of Florida was entered October 2, 1979. The jurisdiction of the Court is invoked pursuant to 28 USC, §1257(3).

QUESTION PRESENTED

Whether the State of Florida Department of Revenue could, without denying to petitioner the equal protection of the laws, assess and collect sales tax on certain transactions of petitioner without taxing the other railroads known by the Department of Revenue to be engaged in identical transactions within the State of Florida?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

This case arose from an administrative decision of the Department of Revenue of the State of Florida (the "Department") assessing a sales and use tax against the Florida East Coast Railway Company ("FEC").

The Department conducted an audit of the books and records of the FEC for the period from November 1, 1971 through October 31, 1974. As a result, on June 18, 1975 the Department issued a "Notice of Assessment of Taxes, Penalties and Interest Under Chapter 212, Florida Statutes". By that assessment, the Department claimed a balance due of $694,049.87 in taxes, exclusive of interest. On December 14, 1977, the Department issued a "Second Revised Notice of Proposed Assessment of Taxes, Penalties and Interest Under Chapter 212, Florida Statutes." The FEC timely protested the assessment to the Department.

Thereafter the parties met in a series of informal conferences in an attempt to settle their differences. The conferences resulted in a partial settlement of the assessment but did not resolve the subject matter of the present litigation.

The FEC timely filed its petition for a formal administrative hearing pursuant to §120.57(1) Florida Statutes, formally contesting certain portions of the assessment. Pursuant to Florida's Administrative Procedures Act, administrative review was conducted by a hearing officer of the Division of Administration Hearings.

In the course of the administrative hearing process, the parties stipulated that the amount of tax in controversy is $201,635.58, exclusive of interest. In order to avoid the high statutory interest provisions applicable to delinquent tax payment, the FEC paid, under protest, the full amount of the tax. The Department did not impose either a delinquency or a fraud penalty against the FEC. The FEC seeks a refund of the total amount in controversy.

At the administrative level, the FEC attacked the validity of the assessment on a number of grounds including the undisputed fact that the FEC alone, among all of the other railroads operating in Florida, was assessed and taxed, thereby unconstitutionally denying the FEC the equal protection of the laws.

A principle witness at the administrative hearing, Mr. Jack McCrone, Supervisor of the Special Audit Section, testified that he had been employed by the Department of Revenue for twenty-seven and one-half years and had held his present job for approximately seventeen years. He testified that his duties included the conduct of audits for the enforcement of the Florida sales and use tax. With respect to the issue of whether the tax assessed against the

FEC had been assessed against other railroads operating in Florida, Mr. McCrone testified as follows, upon questioning by counsel for the FEC:

> Q. What other railroads are there that operate within the state of Florida insofar as you know, Mr. McCrone?
>
> A. There are two railroads that operate in my own jurisdiction. That is the Florida East Coast and the Seaboard Coastline. There are others in the State of Florida.
> Atlanta & St. Andrews Bay Railroad Company.
>
> Southern Railway, subsidiaries operate in the State of Florida and that is all, to my knowledge.
>
> Q. Within your knowledge,

has this tax been imposed against any other railroad?

A. No.

Mr. McCrone further testified concerning this issue as follows:

Q. The period of time that is covered by the audit that we have here covers from November 1, 1971 through October 31, 1974; is that correct?

A. Yes and through actually December 31, 1974. There was a supplemental date.

Q. So that so far as you know for the years 1971 through 1976 at least this tax has not been imposed against anybody else?

A. So far as I know.

Under Florida law (Department of Revenue v. Young American Builders,

330 So.2d 864 (Fla. 1st DCA 1976)), administrative hearing officers are without jurisdiction to entertain constitutional questions. Accordingly, at the formal evidentiary hearing, and subsequently in his Recommended Order, the administrative hearing officer properly declined to address the constitutional issue involved in this case.

Following the formal evidentiary hearing, the administrative hearing officer entered his Recommended Order on March 21, 1978. In that Recommended Order, the hearing officer concluded that the FEC is responsible for the payment of tax. On May 15, 1978, the Department approved the recommended order of the hearing officer. Under Florida law, said approval constitutes final agency action by the Department.

THE JUDICIAL RULINGS BELOW

The FEC perfected an appeal to the District Court of Appeal, First District, State of Florida, pursuant to Rule 9.110, Fla.R.App.P. (FEC v. Department of Revenue, KK-237). The constitutional issue involving the denial of equal protection, having been raised in the administrative process, was presented to the District Court of Appeal for initial determination. On January 23, 1979, the District Court of Appeal filed its per curiam opinion affirming the Department of Revenue's assessment. That opinion held that "the order of the Department of Revenue is free of error..." The FEC moved for a rehearing or a clarification of the per curiam opinion, requesting an explicit determination of the constitutional issue, a copy of that motion for rehearing appears in the Appendix at page 30.

The District Court of Appeal refused to grant a rehearing.

The FEC timely appealed to the Florida Supreme Court pursuant to Rule 9.030(a)(1) Fla.R.App.P., raising only the constitutional issue involved below. The Department moved to dismiss the appeal and the Supreme Court of Florida, on October 2, 1979, granted the motion to dismiss the appeal without specifying its rationale.

REASONS FOR GRANTING THE WRIT

The Florida East Coast Railway has paid $201,635.58 for a sales and use tax which was assessed and imposed solely upon the FEC and not upon any of the other railroads operating within Florida. At the time the tax was finally assessed, the FEC, under Florida law, had no remedy by which it could either obtain relief itself or compel the Department of

Revenue to tax the other railroads. The record is clear that the Department had actual knowledge of the fact that all of the other railroads operating within the State of Florida were engaged in transactions identical to those on which the FEC was taxed. Under Florida law, the Department of Revenue has a mandatory duty to accord all taxpayers equal treatment and to treat all taxpayers equitably. Florida Statutes, §213.01. The record will permit no reasonable question as to the fact that the Department failed to treat the FEC equitably by refusing to assess the other railroads. Usually, a taxpayer so aggrieved can remedy the situation by compelling the taxing authority, through a writ of mandamus, to do its duty to tax the others responsible for the payment of the tax. In this case, a writ

of mandamus was not and is not available to the FEC. Absent the availability of such a remedy, the action of the Department becomes unconstitutional. In cases such as this, this Court has held many times that the aggrieved taxpayer is entitled to a refund of the taxes it paid under protest.

In Sioux City Bridge Company v. Dakota County, Nebraska, 260 U.S. 441, 67 L.Ed. 340 (1923), the Supreme Court of Nebraska ruled that a taxpayer's remedy when its property had been assessed at 100 percent of market value while other taxpayers' properties had been assessed at a lower percentage was "to have the property assessed below its true value raised, rather than to have property assessed at its true value reduced." This Court stated:

"The dilemma presented by

> a case where one or a few of a classes of taxpayers are assessed at 100 percent of the value of their property, in accord with the constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage, in violation of the law, has been often dealt with by courts and there has been a conflict of view as to what should be done. There is no doubt, however, of the view taken of such cases by the Federal courts in the enforcement of the uniformity clauses of state statutes and constitutions, and of the equal protection clause of the 14th Amendment....The conclusion in these and other Federal authorities is that such a result as that reached by the supreme court of Nebraska is to deny the injured taxpayer any remedy at all, because it is utterly impossible for him, by any judicial proceeding, to secure an increase in the assessment of the great mass of underassessed property in the taxing district. This court holds that the right of the taxpayer whose property alone is taxed at 100 percent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute.

> The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect, the decision of the Nebraska supreme court in this case upholds the violation of the 14th Amendment to the injury of the Bridge Company. We must, therefore, reverse its judgment." 260 U.S. at 446-447, 67 L.Ed. at 343.

The above language is particularly pertinent since the FEC has no way to compel the Department of Revenue to assess against the other railroads operating within Florida the challenged tax. The applicable statute of limitations, §212.14(6), Florida Statutes, for any such action is three years. The assessment of the FEC covers the years 1971 through 1974, but the assessment did not become final until December 14, 1977. Thereafter, <u>at the time the</u>

assessment against the FEC became final, the FEC was and still is barred by the statute of limitations from successfully bringing any action to compel the Florida taxing authorities to impose this tax upon all railroads within Florida for the years 1971 through 1974.

In Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 76 L.Ed. 265 (1931) the Supreme Court of Iowa held that the remedy for a taxpayer who had been discriminated against was for the taxpayer to institute suit to have the taxing authorities revise their assessments of other taxpayers' property. This Court reversed, holding that the Iowa decision "rests upon a misconception of the scope and effect of the federal rights involved." 284 U.S. at 244, 76 L.Ed. at 271. This Court went on to state:

> "The fact that the State may still have power to equalize the treatment of the petitioners and the competing domestic corporations by compelling the latter to pay hereafter the unpaid balance of the amounts assessed against them in 1919, 1920, 1921, and 1922 is not material. The petitioners' rights were violated, and the causes of action arose, when taxes at the lower rate were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the petitioners' grievances would have been redressed; for these are not primarily overassessment. The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume

> the burden of seeking an increase of the taxes which the others should have paid. (Citations omitted and emphasis supplied). Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative." 284 U.S. at 247, 76 L.Ed. at 273.

This Court went on to hold that the taxpayers in the Bennett case were entitled to obtain a refund of the excess amount of taxes paid.

As in Bennett, the Supreme Court of Florida, the state court of last resort, has denied the FEC's constitutional right to equal treatment. The Department sought to place upon the FEC the burden of bringing suit to force the taxing authorities of Florida to assess the other railroads. For the precise reason stated in Bennett, such argument by the Department misconstrues the protection of the United States Constitution.

In Hillsborough Township v. Cromwell, 326 U.S. 620, 90 L.Ed. 358 (1946), this Court stated:

> "The equal protection clause of the 14th Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class." 326 U.S. at 623, 90 L.Ed. at 363.

The Department argued strenuously before the Florida appellate courts that under the holding of Louis K. Liggett Co. v. Lee, 288 U.S. 517, 77 L.Ed. 929 (1933), the FEC's sole remedy

was to require the taxing authorities to tax all in the class equally. However, the record discloses that whatever the FEC's right, if any, may have been to institute such a suit, it was barred by the applicable statute of limitations prior to the assessment against the FEC becoming final. Similarly, in Cromwell, supra, this Court stated:

> "In the present case, it appears that respondent's opportunity to appeal to the State Board of Tax Appeals has expired even before the District Court ruled on the Motion to Dismiss. And it is not clear that today respondent has open any adequate remedy in the New Jersey courts for challenging the assessments on local law grounds."
> 326 U.S. 629, 90 L.Ed. 366.

This Court went on to hold that as a consequence the federal action was appropriate. It is absolutely clear that the FEC has no adequate remedy in the Florida courts.

Liggett, supra, was an action to enjoin enforcement of a state tax statute. One attack made on the statute was that the taxing authorities intended to discriminate in their enforcement of this statute. This Court found that the alleged discrimination did not violate the equal protection laws because:

> "The appellants, if they deem the tax illegally omitted in certain cases, may apply for a writ of mandamus to compel the taxing officials to do their duty...and certainly the remedy afforded by state law assured them equal treatment along with all others similarly situated."
> 288 U.S. 540, 77 L.Ed. 940.

Thus, Liggett stands for the proposition that where a taxpayer has a remedy whereby the discriminatory conduct of the taxing authorities can be corrected, the statute itself is not invalid. That is precisely the position of the FEC-it seeks only an adequate remedy for the

discriminatory conduct of the Department of Revenue. That right is what is guaranteed by The Constitution of the United States, and by the decisions of this Court, including Liggett.

The Department has argued below and may argue here that no systematic intentional discrimination exists. However, the FEC has paid $201,635.58 for a tax which no other railroad operating in Florida has paid or will ever pay for the years 1971 through 1974. As the Arizona Court of Appeals held in Maricopa County v. Northcentral Development Co., 556 P.2d 688 (Ariz.Ct.Apps. Div. 1, Dept.B, 1977), the fact that state tax assessors believed that their conduct was valid and acted in good faith was not sufficient to justify inequality of treatment deliberately created by the acts of those authori-

ties. That case clearly held that the state cannot single out some taxpayers from a class for selective enforcement of a taxing statute otherwise valid. In that case the appellate court affirmed a refund of a tax which had been assessed against only some members of a class of similarly situated taxpayers. The court reasoned that unless such a refund were granted, the singled out taxpayer would never have a remedy for the discriminatory actions of the taxing officials. Similarly, if the FEC does not obtain a refund of the monies it has paid for the tax assessed solely against it, it will have no remedy for this discriminatory and selective enforcement of the Florida tax statute.

CONCLUSION

The enforcement of an otherwise valid tax statute against one and only

one member of a class of similarly situated taxpayers to which the tax was meant to apply violates the equal protection clause of the United States Constitution. The FEC is without a remedy for this violation of its Federal Constitutional rights unless this Court grants certiorari and reverses the opinion and decision of the Supreme Court of Florida.

WHEREFORE, petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Florida in Florida East Coast Railway Company v. State of Florida, Department of Revenue. In the event that the petition is granted, petitioner prays that the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to order the

State of Florida Department of Revenue to refund to petitioner the taxes challenged in this petition.

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Of Counsel

APPENDIX A

SUPREME COURT OF FLORIDA

TUESDAY, OCTOBER 2, 1979

FLORIDA EAST COAST RAILWAY COMPANY, Appellant,	*	CASE NO. 56,497
v.	*	District Court of
STATE OF FLORIDA, DEPARTMENT OF REVENUE, Appellee.	*	Appeal, First District KK-237

* * * * * * * * * * *

Motion to Dismiss filed by attorney for Appellee is granted and it is ordered that the appeal be and the same is hereby dismissed.

ENGLAND, C.M., OVERTON, SUNDBERG and ALDERMAN, JJ., concur
ADKINS and BOYD, JJ. dissent

A True Copy
TEST:
Sid J. White
Clerk, Supreme Court
By:/s/D. Casseaux
Deputy Clerk

TC
CC: Hon. Raymond E. Rhodes, Clerk
William L. Durden, Esq.
George E. Ridge, Esq.
E. Wilson Crump, II, Esq.
Harold F.X. Purnell, Esq.
John D. Moriarity, Esq.

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

FLORIDA EAST COAST RAILWAY COMPANY, Appellant, vs. STATE OF FLORIDA, DEPARTMENT OF REVENUE, Appellee.	* NOT FINAL * UNTIL TIME * EXPIRES TO * FILE * REHEARING * PETITION AND * DISPOSITION * THEREOF IF * FILED. * CASE NO. KK-237

Opinion filed January 23, 1979.

An Appeal to Review Final Agency Action of the Department of Revenue - Original Jurisdiction.

Frederick H. Kent, William L. Durden and George E. Ridge of Kent, Sears, Durden & Kent, for Appellant.

Robert L. Shevin, Attorney General, and Harold F.X. Purnell Assistant Attorney General, for Appellee.

PER CURIAM.

The Court has carefully considered the appeal of Florida East Coast Railway Company from the Order of the Department of Revenue wherein the Department upheld the validity of the assessment of a sales

and use tax against said railway. The order of the Department of Revenue is free of error, and the same is AFFIRMED.

MILLS, Acting Chief Judge, MELVIN, J., and MASON, ERNEST E., Associate Judge, CONCUR.

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

FLORIDA EAST COAST RAILWAY CO.,)

Appellant.)

vs.)

STATE OF FLORIDA, DEPARTMENT OF REVENUE,)

Appellee.)

MOTION FOR REHEARING

Pursuant to the provisions of Rule 9.330(a), Fla.R.App.Proc., the Appellant, Florida East Coast Railway Co., respectfully moves this Honorable Court to reconsider its Per Curiam Opinion entered herein under date of January 23, 1978, and in support thereof calls the attention of the Court to the points of law or facts which the Court has overlooked which are as

follows:

1. The Opinion rendered by the Court under date of January 23, 1979, concludes that "The Order of the Department of Revenue is free of error, and the same is AFFIRMED."

2. The Order of the Department of Revenue from whence this appeal was taken provides on Page 13 thereof as follows:

> "Finally, in examining the third argument of the Petitioner, it is contended that the action of the Respondent denies the Petitioner equal protection of the laws, due process of law and constitutes an undue burden upon interstate commerce, in violation of the Federal and Florida Constitution. These arguments were allowed to be advanced in the record in the form of a limited proffer; however, the undersigned was of the persuasion that no decision could be rendered on the constitutionality of the action taken by the Respondent because the undersigned was without authority to make those determinations. The reason for this approach by the undersigned is due to the statement found in Department of

Revenue, et al. v. Young American Builders, 330 So.2d 864, (Fla. 1st DCA, 1976). That case holds that the Administrative Procedures Act does not relegate Fourteenth Amendment questions to administrative determination. Consequently, although the parties through their memoranda, argue the constitionality of the action taken by the Respondent, those matters will not be addressed in this recommended order." (Emphasis added)

3. It, therefore, affirmatively appears that the Department of Revenue did not pass upon nor rule upon the constitutional question submitted by Florida East Coast Railway Company.

4. The constitutional question was raised for the first time in the District Court of Appeal for the First District in this appeal and, therefore, the holding of this Court that "The Order of the Department of Revenue is free of error..." does not affirmatively indicate a determination of that constitutional issue by this Court.

WHEREFORE, whether in the nature of

a rehearing or for a clarification of its Per Curiam Opinion, Appellant respectfully requests this Court to specifically consider and pass upon that constitutional issue as presented to the Court.

KENT, WATTS, DURDEN, KENT & MICKLER

By /s/ William L. Durden
William L. Durden

870 Florida First National Bank Building
Jacksonville, Florida 32202
(904) 354-1600

Attorneys for Appellant, Florida East Coast Railway Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to John D. Moriarity, Esquire, Department of Revenue, Division of Administration, Room 104, Carlton Building, Tallahassee, Florida 32304; and F.X. Purnell, Esquire, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32304, by mail delivery this 5th day of February, 1979.

/s/ William L. Durden
Attorney

STATE OF FLORIDA, DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

FLORIDA EAST COAST RAILWAY COMPANY,
Petitioner,
vs.
STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Respondent.

CASE NO. 76-1565

NOTICE

TO: William L. Durden, Esquire
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Baya Harrison, III, Esquire
Ausley, McMullen, McGehee,
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Tallahassee, Florida 32302
Attorneys for Petitioner

Harold F.X. Purnell, Esquire
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32304
Attorney for Respondent

You will please take notice that the Governor and Cabinet of the State of Florida, acting as head of the Department of Revenue, at its meeting on the 16th day of May, 1978, approved the Recommended Order of the Hearing Officer dated March 21, 1978. This constitutes final agency action by the Department of Revenue.

/s/ John D. Moriarty
JOHN D. MORIARTY, ATTORNEY
DIVISION OF ADMINISTRATION
DEPARTMENT OF REVENUE
ROOM 104, CARLTON BUILDING
TALLAHASSEE, FLORIDA 32304

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice was furnished by mail to William L. Durden, Esquire, Kent, Sears, Durden & Kent, Attorneys at Law, 870 Florida National Bank Building, Talahassee, Florida 32202; Baya Harrison, III, Esquire, Ausley, McMullen, McGehee, Carothers & Proctor, Attorneys at Law, Post Office Box 391, Tallahassee, Florida 32302, Attorneys for Petitioner; Harold F. X. Purnell, Esquire, Assistant Attorney General, Department of Legal Affairs, The Captol, Tallahassee, Florida 32304, Attorney for Respondent; Charles C. Adams, Esquire, Hearing Officer, Division of Administrative Hearings, Room 530, Carlton Building, Tallahassee, Florida 32304, this 17th

day of of May, 1978.

/s/ John D. Moriarty
JOHN D. MORIARTY, ATTORNEY

STATE OF FLORIDA

DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA EAST COAST RAILWAY COMPANY,	)	
	)	CASE NO.
Petitioner,	)	76-1565
vs.	)	
	)	
STATE OF FLORIDA, DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was held before Charles C. Adams, a Hearing Officer with the Division of Administrative Hearings, at the Conference Room, Suite 205, Building "B", 6501 Arlington Expressway, Jacksonville, Florida at 10:00 A.M., December 15, 1977.

APPEARANCES

For the Petitioner:

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and

Baya Harrison, III, Esquire
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For the Respondent:

Harold F.X. Purnell, Esquire
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32304

ISSUE

The issue in consideration in this case concerns the second revised notice of proposed assessment of tax rendered by the Respondent, State of Florida, Department of Revenue, on December 14, 1977 to the extent of $201,635 together with applicable interest. The theory

of taxation is found in Chapter 212, Florida Statutes, and the period of the tax audit dates from November 1, 1971 through October 31, 1974. The specific transaction in issue is the usage by the Petitioner of equipment belonging to Trailer Train Company, Inc., and Fruit Growers Express Company, Inc., which the Respondent claims constitutes taxable events.

FINDINGS OF FACT

Originally this case was an action for formal hearing filed by the Petitioner against the initial notice of proposed assessment of tax, penalties and interest under Chapter 212, Florida Statutes. This notice of proposed assessment was dated June 19, 1975 and can be found as Petitioner's Exhibit #2, admitted into evidence. Since that time a second revised notice of proposed assessment of

of tax, penalties and interest under Chapter 212, Florida Statutes, has been made. The date of that second revision is December 14, 1977 and may be found as Petitioner's Exhibit #1, admitted into evidence. Although the case started as a challenge to the proposed assessment without paying it, the Petitioner has subsequently paid the entire amount of assessment under protest. Therefore this action has become a request for refund and the refund request only encompasses a portion of the alleged assessment. The details of the true nature of these proceedings i.e., refund request versus action without payment, became evident at the date of the hearing in this cause. At that time the undersigned advised the parties to the effect that the State of Florida, Office of Comptroller, was felt to be the

true Respondent in interest. This position was founded on the impression that the Office of the Comptroller has the responsibility for making refund payments where the occasion demands. The parties were further advised by the undersigned, that the Comptroller, in deciding on the refund question, was acting in the exercise of his discretion and not merely performing a ministerial act.

Counsel for the Respondent stated for the record that the Office of Comptroller had not been noticed of the hearing, nor had they been informed of any refund request. In keeping with his suggestion, the record was left open at the conclusion of the hearing for 20 days to allow Mr. Purnell, counsel for the Respondent, to contact the Office of Comptroller to see if that

office would be willing to join in the case post-hearing. The idea was that Mr. Purnell would consult with the Office of Comptroller and determine whether or not that office wished him to represent them in the hearing and to allow the record of the hearing to stand as a record which the Comptroller could consider in deciding the refund question. Mr. Purnell felt that the Comptroller might be amenable to such a resolution because attorneys from the Attorney General's Office often represent the Comptroller in tax cases. The recommended order being written could then become a recommendation on the question of the refund. The same amount of time which would be allowed to Mr. Purnell to confer on the question of appearances for the Comptroller was allowed for the Petitioner to file a refund request with

the Office of Comptroller.

The extra time allowed at the conclusion of the evidence in the hearing of December 15, 1977 was granted with the caveat from the undersigned that the Office of Comptroller might not wish to enter the case on a post-hearing basis, and with the understanding that a hearing held without the Comptroller's participation might become advisory in nature and not binding. By this, it was further explained that the Comptroller could choose to have a further de novo hearing on the same issues if he did not make a post-hearing appearance and adopt the record to use as a basis of a recommended order from the undersigned. Nonetheless, counsel for the Petitioner and Respondent wished to proceed with the hearing based upon the prior agreements which the Attorney

General's office had with the Comptroller to represent them in tax matters, and a feeling that Mr. Purnell, as a member of the Attorney General's staff would be able to promote the joinder of the Office of Comptroller post-hearing. Counsel for the Petitioner's response to the need to file a request for refund, was that the refund could be summarily denied at the time of the joinder, thereby facilitating the utilization of the information produced at the de novo hearing of December 15, 1977. In summary the parties agreed to proceed to hearing, in spite of the fact that the Comptroller had not been joined, the refund request had not been made, and the existing possibility of a second de novo hearing to perfect the rights of the Office of Comptroller in considering the refund request.

Subsequent to the hearing Mr. Purnell has not made an appearance for the Office of Comptroller, and the Comptroller is not joined as a party. To this date a refund request has not been filed by the Petitioner and the succeeding Findings of Fact and Conclusions of Law and Recommendation shall be governed by those arrangements which are made by the parties and/or the Office of Comptroller subsequent to their receipt of this recommended order. (The discussion of the procedural questions under consideration related here may be found in pages 7 - 18 of the transcript of the hearing.)

As stated before the Petitioner has paid the tax claim under Chapter 212, Florida Statutes, per the second revised notice of proposed assessment, dated December 14, 1977. Specifically, the payment has been $558,772.82, the amount

set at the time of the payment. There remains in controversy an amount of $201,635.58, exclusive of interest. This amount in controversy may be found in the position of the parties in their January 20, 1978, letter of stipulation that sets out the amount in dispute. A copy of this letter is admitted and made a part of the record herein, and attached to this recommended order. The claim for refund is governed by the provisions of Section 215.26, Florida Statutes. More particularly it is a claim for refund where payment was made and where it is alleged that no tax was due.

That part of the tax that is still at issue is being assessed under the authority of Chapter 212, Florida Statutes. In particular the Respondent is claiming the right to tax certain transactions between the Petitioner and two railroad car

companies, the companies being: Fruit Growers Express Company, Inc., A Delaware corporation and Trailer Train Company, Inc., a Delaware corporation. The Petitioner, Florida East Coast Railway Company, Inc., is a Florida corporation.

The theory the Respondent used in its second revised notice of assessment of tax that pertains to the aforementioned transactions between the Petitioner and Fruit Growers Express Company, Inc., and Trailer Train Company, Inc., is found in Sections 212.02(6)(g) and 212.05(4), Florida Statutes. Respectively those provisions provide:

> 212.02(6)(g) "Lease","let" or "rental" also means the leasing or rental of angible personal property and the possession or use thereof by the lessee or rentee for a consideration, without transfer of the title of such property, except as expressly provided to the contrary herein. Provided that, where two tax-

> payers, in connection with the interchange of facilities, rent or lease property, each to the other, for use in providing or furnishing any of the services mentioned in s.167.431, the term "lease" or "rental" shall mean only the net amount of rental involved.
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> * * *
>
> 212.05(4) At the rate of 4 percent of the lease or rental price paid by lessee or rentee, or contracted or agreed to be paid by lessee or rentee, to the owner of the tangible personal property.

In view of the language found in the above cited sections, the Respondent has taken the position that the Petitioner owes the amount of the disputed tax, which constitutes 4 percent of the lease or rental price paid by the lessee or rentee (Petitioner), for those transactions within the audit period, November 1, 1971 through October 31, 1974 entered into between the Petitioner and Fruit Growers Express Company, Inc., and Trailer Train Company, Inc. More particularly,

in the process of examining the records of the Petitioner, related to the audit period, the Respondent concluded that on those occasions where the Fruit Growers Express Company, Inc., and Trailer Trains Company, Inc. provided refrigerated cars through the former corporation and railroad flat cars through the latter corporation, pursuant to the request of the Petitioner; this constituted a taxable privilege within the meaning of Section 212.05, Florida Statutes. Through its refund petition the Petitioner challenges the assessment by several theories of argument.

The first theory claims that the transactions in question do not constitute taxable transactions within the meaning of Chapter 212, Florida Statutes. The second theory asserts that the Respondent, by virtue of its assessment against

the Petitioner, was promulgating a "rule" within the meaning of Chapter 120, Florida Statutes, and that the promulgation was not in keeping with the provisions of said chapter. The final theory in argument is comprised of constitutional arguments to the effect that the assessment denies the Petitioner equal protection of the laws, due process of law, and constitutes an undue burden upon interstate commerce, in violation of the Federal and Florida Constitution.

The parties have submitted memoranda in the agrument of the case and under the first point of its memorandum the Petitioner considers the alleged inapplicability of Chapter 212, Florida Statutes to the transactions between the Petitioner and Trailer Train Company, Inc., and Fruit Growers Express Company, Inc. (This argument is found on pages 14 - 46 of

the Petitioner's memorandum). The theory of the Petitioner's position on this point is to the effect that the transactions in question between the Petitioner and Trailer Trains Company, Inc. and Fruit Growers Express Company, Inc. do not constitute sales, storage or use upon which a 4 percent rate of tax may be imposed. This feeling is held because the Petitioner is persuaded that the transactions in question are not the result of some lease or rental between the Petitioner and the aforementioned car companies. Therefore, because the 4 percent tax under Section 212.05(4), Florida Statutes, applies to leases or rentals only, there can be no tax.

In advancing this argument the Petitioner relies on the attitude of the Respondent in concluding that the trans-

actions found in the audit period which pertain to payments by the Petitioner to other railroads for per diem and mileage, for the usage of the rolling stock belonging to the other railroads, did not constitute transactions for which some tax is owed by the Petitioner under the theory set forth in Chapter 212, Florida Statutes.

The Petitioner contends that the determination not to tax the transactions between the Petitioner and the other railroads was a correct determination, and in view of the fact that the arrangements between the Petitioner and Trailer Train Company, Inc. and Fruit Growers Express Company, Inc. constitute virtually the same type of agreement entered into with the other railroads; it was incorrect for the Respondent to tax the payments to the private car companies. The Petitioner,

by its position suggests that the Respondent apparently relied on the opinion of the Interstate Commerce Commission in the case of Chicago, Burlington & Quincy R.Co., et al., v. New York, Susquehanna & Western Railroad Co. et al., 332 I.C.C. 176, is not taxing the one client. The case held that the per diem and mileage arrangements between the various railroads to pay each other for the usage of cars belonging to the sending railroad that were traveling as a part of the trains on the receiving railroad's track had been, and should be, uniform. In the opinion of the Commission, the per diem and mileage charges were in the nature of a reciprocal charge and were designed to represent the average cost of car ownership. Moreover, the idea was that the charge should be equivalent to what the

average car ownership would be users would have to bear if they owned the car themselves. Using the rationale of Burlington, supra, the Petitioner advances the theory that because the common rates for per diem and mileage between the railroads are in the nature of a reciprocal charge and do not include any element of profit, they do not constitute rent within the meaning of Chapter 212, Florida Statutes.

The Petitioner makes further reference to Section 212 of the 4R Act, Amended Section (1) (14) (a) of the Interstate Commerce Act, which discusses the intention of the Congress to encourage the purchase, acquisition and efficient utilization of freight cars. To that end the Interstate Commerce Commission has allowed pooling arrangements in which the railroads are

allowed to use the equipment belonging to concerns such as Trailer Train Company, Inc. The significance of this, according to the Petitioner is found in the case of American Rail Box Car Company and Trailer Train Company, Inc. et al., 347 I.C.C. 862 (1974).

The case of American Rail Box, supra, discusses the fact that the Commission has the authority to fix the compensation to be paid by a railroad for the use of the freight cars that are not owned by the railroad, whether those freight cars belong to another railroad or to a car company such as Trailer train Company, Inc. The Petitioner urges that this decision would also have application to the use of cars belong to Fruit Growers Express Company, Inc. According to the Petitioner although the decision holds that the Interstate Commerce Commission

is not presently setting the per diem and mileage charge of Trailer Train Company, Inc., it makes clear that it will act to change the policies of the Board of Directors of Trailer Train Company, Inc. who set the mileage and per diem, if the Commission concludes that the policies on mileage and per diem costs are inconsistent with the purposes of pooling arrangements and the overall purpose of the Interstate Commerce Act.

What the Petitioner tries to demonstrate after discussing the involvement of the Interstate Commerce Commission in the matters of using the equipment from other railroads or equipment from car companies, which does not belong to the Petitioner; is that there is sufficient similarity between transactions involving the Petitioner and other rail-

roads and transactions such as those at issue here between the Petitioner and the car companies, to warrant the conclusion that the Petitioner should not be taxed on the transactions in the latter category.

The Petitioner contends that the considerations which go into making up the rate structure for per diem and mileage payments that have application to transactions between the railroads for the use of a competing carrier's cars, are the same considerations that are examined in determining the per diem and mileage payments between the Petitioner and Trailer Train Company, Inc. and the mileage paid to Fruit Growers Express Company, Inc. For this proposition the Petitioner uses as authority those decisions of Burlington and American Rail Box, supra, entered by the Interstate Commerce Commission.

There is some attendant argument made to the effect that the controls which the Petitioner would have over railroad cars belonging to competing railroads and those controls which it would have over the cars belonging to Trailer Trains Company, Inc. and Fruit Growers Express Company, Inc. are the same for those cars which are not covered by Car Service Rules 1 and 2 or assigned to a pool point. Cars involved with Car Service Rules 1 and 2 pertain to railroad cars belonging to competing railroads which must be directed toward the home road once they have been off-loaded by the Petitioner. The designated cars refer to those belonging to Trailer Train Company, Inc. which are "car rack carriers" that have a designated usage and must be dealt with consistent with that usage to the exclusion of the rights of the railroad should a conflict arise.

The Petitioner's argument also states that the interchange process by which the Petitioner receives cars belonging to other railroads or car companies, is mandated by the Interstate Commerce Commission and the Petitioner may not refuse to accept those cars which come on its road.

In summary, in the eyes of the Petitioner, the control which the Interstate Commerce Commission has over the question of per diem and mileage payment pertaining to transactions between railroads and car companies; the considerations which go into making up what constitutes a reasonable per diem and mileage allowance, when examining the transactions between railroads and railroads and car companies; and the similarity of the degree of control which a receiving railroad has over cars belonging to another

railroad or car company; taken in the context of the Respondent's failure to tax the Petitioner for its transactions involving per diem and mileage payments to other railroads for the transactions between them, demonstrates that the tax at issue is not owed.

In countering the argument offered by the Petitioner on its first point, Respondent, through its memorandum, points to the contracts between the Petitioner and Trailer Train Company, Inc. and Fruit Growers Express Company, Inc. The copy of the contracts may be found as Petitioner's Exhibits 4 and 5, admitted into evidence. The Petitioner's Exhibit 4 is a copy of the contract with Fruit Growers Express Company, Inc. and Petitioner's Exhibit 5 is a copy of the contract with Trailer Trains Company, Inc. Under the Respondent's theory the con-

tracts represent agreements between the Petitioner and separate entities to provide rolling stock to the Petitioner on an as-needed basis; notwithstanding the fact that the Petitioner is a part owner in the Trailer Train Company, Inc. (The Petitioner is in fact one of the 29 railroads which own that company.) From the point of view of the Respondent, these contracts constitute the basis for the Petitioner to rent the equipment belonging to those two car companies, and consequently when the equipment is rented the Petitioner becomes subject to the requirements of the payment of a sales tax in the amount of 4 percent under the authority of Chapter 212.05(4), Florida Statutes. Moreover, the Respondent is of the persuasion that Section 212.02(6)(g), Florida Statutes, which states that rental is defined as

meaning the rental of tangible personal property and the possession or use thereof by the rentee for consideration, that does not involve the transfer of the title of such property, would cover the subject disputed transaction.

To address the contention of the Petitioner that the failure of the Respondent to tax the transactions between the Petitioner and other railroads stands as authority for not taxing the transactions between the Petitioner and the aforementioned car companies; the Respondent argues that the failure to tax in one given area does not create an excuse for the Petitioner not to pay the tax in another unrelated area. This means that the Respondent believes that even if it could tax the transaction between railroads for per diem and mileage payments and chose not to, it does not follow that it may

not tax the transactions between the Petitioner and the car companies, because of its failure to impose a tax on the transactions between the Petitioner and another railroad. The Respondent cites the case of Louis K. Liggett Company v. Lee 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed. 929, 1933 in support of that position.

The Respondent tries to establish the difference in the nature of the business of Trailer Train Company, Inc. and Fruit Growers Express Companu, Inc. contrasted with the business of the Petitioner who is a common carrier by rail. In the mind of the Respondent, one of the operations is the business of hauling freight by rail, i.e., the Petitioner, or other common carriers; whereas the car companies in this matter are in the business of purchasing, maintaining and supplying the railroads with cars. The

Respondent attempts to minimize the affect of the Petitioner's argument on the similarity of the nature of the items that go into making up the per diem and mileage rates which are involved between railroads or involved between railroads and car companies. In the Respondent's analysis, the car companies are in the business of making a profit and the rental charges are set up in such a fashion that the car companies may gain retained earnings and this is not the real purpose for mileage and per diem charges between railroads.

Finally, the Respondent argues that the control which the Petitioner has over the cars belonging to the car companies that were received under the terms of the contracts, is much greater than the control that it would

have over cars belonging to competing railroads, especially those cars which are subject to Car Services Rules 1 and 2. The Respondent's belief is that the Petitioner has almost unfettered control over classes of equipment received under the terms of the contract from the car companies, by contrast with the necessity to reroute the equipment belonging to the other railroads which is subject to Car Services Rules 1 and 2.

A second point in this argument by the Petitioner is the matter of the alleged non-compliance by the Respondent with the provisions of Chapter 120, Florida Statutes. The Petitioner argues that Section 212.05, Florida Statutes, has been law since 1968, and to the knowledge of the Petitioner, this is the first instance in which the Respondent attempts to impose a tax under that section, which tax would pertain to transactions such as those at issue. The Petitioner feels that the Respon-

dent has attempted to adopt a rule for imposing a tax of this sort without going through the requirements of Section 120.53, Florida Statutes, which set forth the conditions for adoption of administrative rules of general applicability. Furthermore, the Petitioner feels that the efforts made by the Respondent were of the sort which were held to be a violation of Chapter 120, Florida Statutes, in the decision of Straughn v. O'Riordan, 338 So.2d 832 (Fla. 1976). This course of non-compliance with the rule making provisions was established in the mind of the Petitioner by the actions of the Respondent's employees making numerous telephone calls among the staff to determine whether a tax should be imposed and in setting forth a policy statement by its remarks found in a document which

was prepared by the Respondent, all without following the provisions of Section 120.53, Florida Statutes. A copy of this document is Petitioner's Exhibit 3, admitted into evidence.

The Respondent argues that the Chapter 212, Florida Statutes, allowed for the imposition of a tax of the nature which is at issue herein; even though the tax had not been imposed in the past. The actions of the phone calls and the written comments of Petitioner's Exhibit 3, constituted the "work product" opinion of the employees of the Petitioner and did not constitute an attempt to adopt a rule within the meaning of Section 120.53, Florida Statutes.

Finally, in examining the third argument of the Petitioner, it is contended that the action of the Respon-

dent denies the Petitioner equal protection of the laws, due process of law and constitutes an undue burden upon interstate commerce, in violation of the Federal and Florida Constitution. These arguments were allowed to be advanced in the record in the form of a limited proffer; however, the undersigned was of the persuasion that no decision could be rendered on the constitutionality of the action taken by the Respondent because the undersigned was without authority to make those determinations. The reason for this approach by the undersigned is due to the statement found in Department of Revenue, et al. v. Young American Builders, 330 So.2d 864, (Fla. 1 St. DCA, 1976). That case holds that the Administrative Procedures Act does not relegate Fourteenth Amendment questions

to administrative determination. Consequently, although the parties through their memoranda, argue the constitutionality of the action taken by the Respondent, those matters will not be addressed in this recommended order.

The remaining two points which have been raised by the Petitioner will be considered in reverse order for purposes of clarity.

The question of whether the action taken by the Respondent, by its phone calls between employees of the Respondent and by its statement of the employees found in Petitioner's Exhibit 3, constitutes an effort to promulgate a rule within the meaning of Section 120.53, Florida Statutes, must be answered in the negative. The employees in acting in the fashion that they did were acting under the inherent author-

ity found in Chapter 212, Florida Statutes, which was sufficient to render a notice of proposed assessment without the necessity for the promulgation of any rule which would implement the authority found in that statute. Those contacts that were made between employees during the audit process were made within the scope of authority found in Chapter 212, Florida Statutes, and the Petitioner's Exhibit 3, constitutes the "work product" of the Respondent and is not an abortive attempt at promulgating a rule in the sense described in Straughn, supra.

In considering the factual applicability of Chapter 212, Florida Statutes, to the transactions between the Petitioner and the two car companies, it is not necessary to consider the propriety or impropriety of the Respon-

dent's decision not to attempt an assessment of the transactions between the Petitioner and competing railroads, on the question of the utilization of the cars belonging to those railroads. That part of the audit process is not at issue. Moreover, although the authority and rights of the Interstate Commerce Commission to consider the arrangements between Petitioner and any car company may not be denied, the Commission's attitude about the imposition of the tax that is being contemplated cannot be evaluated by the undersigned and must be left for the study of another forum.

Therefore, when the transactions are examined purely on the basis of their inherent nature, they constitute rentals within the meaning of Section

212.02(6)(g), Florida Statutes, and a tax must be paid on the transactions at the rate of 4 percent in keeping with the provisions of Section 212.05(4), Florida Statutes. This conclusion is reached because the documents, Petitioner's Exhibits 4 and 5, clearly establish the method by which the car companies, upon request of the Petitioner, will provide equipment to the Petitioner and when the Petitioner receives this equipment it is renting the equipment at the rate fixed for per diem and mileage.

Upon this finding and in keeping with the stipulation entered into between the parties the Petitioner is responsible for the payment of $201,635.58 in tax exclusive of interest. The amount of interest should be computed consistent with the pro-

visions of Chapter 212, Florida Statutes.

CONCLUSIONS OF LAW

1. The Division of Administrative Hearings has jurisdiction in this cause.

2. Based upon an examination of the facts in this matter and in consideration of the arguments offered by the parties, it is determined that the Petitioner is responsible for the payment of tax in the amount of $201,635.58, exclusive of interest, together with interest that is outstanding on the principal amount of tax.

RECOMMENDATION

It is recommended that the Petitioner be required to pay tax in the amount of $201,635.58, together with applicable interest.

DONE AND ORDERED this 20th day

of March, 1978, in Tallahassee, Florida.

/s/ Charles C. Adams
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